

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**





77-2087

IN THE UNITED STATES COURT OF APPEALS

NOV 1 1977

IN AND FOR THE SECOND CIRCUIT

B

NORMAN WILCOX,

Appellant,

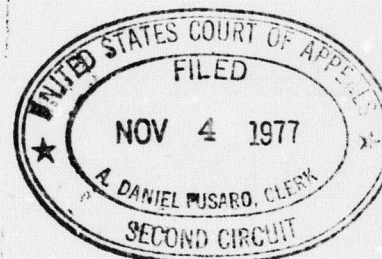
v

Docket No. 77-2087

UNITED STATES OF AMERICA,  
Respondent.

## BRIEF & APPENDIX

Appeal from the order of the U.S. District Court denying motion  
to vacate pursuant to 28 U.S.C., 2255.



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## A R G U M E N T

Whether the district court erred in  
the conduct of pre-trial suppression  
hearings in the absence of petitioner

On March 12, 1973, the district court erred when it began hearing evidence in the absence of petitioner/appellant on his motion to suppress. In opposition to the motion to vacate the government does not dispute the fact that the sixth amendment of the United States Constitution and rule 43 of the Federal Rules of Criminal Procedure guarantees a defendant the right to be present at a pre-trial suppression hearing where evidence being heard might be controverted. see United States V Clark, 240 F2d 240. The governments sole contention is that, "for tactical reasons each attorney chose to exclude his client from the hearings, and that this decision waived petitioner's right to be present as effectively as if the court had conducted an on the record voir dire of each petitioner before acceding to his absence<sup>2</sup>.

In Henry V. Mississippi, 379 U.S. 443 (1965), the Supreme Court ruled that, counsel in criminal proceedings may waive certain of their clients constitutional rights, even if the waiver is taken without prior consultation with the defendant.

Implicit in the Supreme Court's approval of this "waiver rule", is the recognition that there must be some allocation of authority between attorney and client during the course of a criminal trial.

On a practical level, the procedure is mandated by considerations of judicial economy and efficiency, since any contrary approach would require the defendant's direct participation in all aspects of the trial. For this reason, a broad "waiver-rule" allowing counsel considerable leeway in formulating a trial strategy is considered necessary. see: Winters V. Cook, 489 F.2d 174. However, there are limitations to the Supreme Court's holding in Henry. Certain constitutional rights have been held to be of such "fundamental importance" that Courts have determined that they cannot be waived by trial counsel, but rather, must be waived by the defendant.

The development of the "waiver-rule", and its exceptions, is discussed at some length in note, Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970). As we stated in that article:

"The waiver test was originally developed to deal with "fundamental constitutional rights." It appears that the decisive factor in a decision to require a personal waiver is the fundamental nature of the right at stake. Certain rights are inherently personal and requires personal waiver as a matter of constitutional law; but in other instances as well as the determination of the waiver rest on the importance, in a constitutional sense, of the right in question--it is difficult to find a sound rationale for the line drawing among constitutional rights. The current distinction between fundamental rights only incidentally reflect the functional purpose that lie behind giving the attorney any authority to bind his client at all." 83 Harv. L. Rev. 1111-12.

The Court of Appeals for this Circuit has held that the right to be present, even during the trial itself, may be waived, U.S. V. Tortora, , 464 F. 2d 1202, and appears to assume that in court statements of the Attorney may be sufficient to effect the waiver, U.S. V. Crutcher, 405 F.2d



at 243; however, the records and files of the instant case lacks any basis whatsoever why the district court considered before acceding to the absence of appellant. In an apparent attempt to justify the absence of appellant, the government submitted ex parte affidavits of persons involved in the hearings that supposedly reflects the considered choice of appellant's attorney to waive his presence at the pre-trial suppression hearings.

These affidavits fail to establish any persuasive justification that would permit defense counsel to make a decision to waive appellant's sixth amendment rights that would be binding upon him (appellant); and in addition, as a matter of law, ex parte affidavits are not conclusive proof against any facts put in issue, and are no more than mere evidentiary factors to be taken into consideration along with all other evidence in the case. see Taylor V. United States, 437 F.2d 307; Walker V. Johnston, 312 U.S. 275; and Whalley V. Johnston, 316 U.S. 101. Therefore, the district court did not have before it the proper record upon which its findings and conclusions could be based without further adversarial inquiry in the form of an evidentiary hearing with the appellant and his co-defendants present.

Appellant was surely entitled to assist his attorney in cross-examining witnesses, and in developing these matters further at the suppression hearing for the following reasons....

I)... On Sept. 14, 1972, petitioner along with his co-defendants were present when Danbury Police and agents of the F.B.I. gained entrance to the residence knowned as 42-A Virginia Avenue, Danbury, Connecticut, and supposedly observed incriminating evidence that served the basis for the police to secure a search warrant on the following day. Although government witness,

Frances Gary, testified that she voluntarily consented to the Law Enforcement Officer's entrance into her home, petitioner would've presented evidence contradicting the voluntariness of her consent by pointing out to the court that Frances Gary was merely acquiescing to the officers demands under the color of law.

II). Petitioner was arrested by a New Jersey State Trooper after contraband was seized from his motorcycle's saddlebag following a warrantless search. Because this was a situation in which petitioner was a participant, his absence from the pre-trial suppression hearing at the time Trooper Fedorka gave his account of the incident cannot be regarded as harmless where the appellant intended to controvert the evidence being heard by the court, and where the appellant had not been briefed or given a copy of the transcript reflecting the "Troopers" testimony.

III). Although the district court's decision on appellant's motion to suppress the eleven five-dollar bills taken from appellant's personal effects while he was in jail was specifically affirmed by the Court of Appeals on direct appeal from appellant's conviction; petitioner's absence from the pre-trial hearings deprived him of the opportunity to present the court with vital facts for its consideration in regards to the fact that policies and regulations of the Middlesex County Jail state that "once the administrative process and mechanics of arrest are completed, no official of that jail is authorized to release the personal property of an inmate, or any part thereof without the expressed consent of the inmate, or pursuant to a court order."

Appellant cannot accept, and urge the court not to accept, as palatable any argument that he agreed with counsel to waive his rights to be present at the pre-trial suppression hearings, or that counsel made such a determination



on his own after fully considering the facts of case.

The Supreme Court has consistently taken the position that a waiver of a constitutional right or privilege is to be measured against a high standard. As the Court stated in Johnson v. Zerbst, 304 U.S. 458;

"It has been pointed out that the Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights." 304 U.S. at 464.

In the instant matter, the district court has found that appellant's court-appointed attorney waived his rights to be present at the pre-trial suppression hearings because of the possibility of him being identified by government witnesses that had been subpoenaed to testify at that proceeding. Because the witnesses who had been subpoenaed to testify at that proceeding were already acquainted and/or familiar with appellant, such reasoning lacked persuasive justification in view of the fact that it was necessary for appellant to be present and to present evidence in his behalf with regards the circumstances surrounding several searches in which appellant had been a participant.

#### CONCLUSION

It is submitted by appellant that because defense counsel did not have the authority to waive appellant's rights to be present at the pre-trial hearing on the motion to suppress, and there being no persuasive justification for appellant's absence, that this honorable court remand this cause for a new suppression hearing at which petitioner shall be given the opportunity to relitigate said motion to suppress evidence.

Parole Officer-Authorized by  
Act of July 7, 1955, to administer  
oaths (18 U.S.C. 4004f)

Submitted by and subscribed *Respectfully Submitted*  
*23 day of August 1977*  
*Norman Wilson*  
*Hermit R. Hoffman*



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PLAINTIFFS

DEFENDANTS

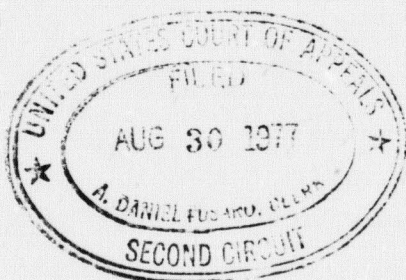
NORMAN WILCOX

UNITED STATES OF AMERICA

CAUSE Vacate Sentence. 28 U.S.C.  
Sec. 2255.

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ATTORNEYS Diana Garfield  
Asst. U.S. Attorney  
P. O. Box 1824  
New Haven, Conn. 06508



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PROCEEDINGS

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Petition filed.

Ruling filed Ordering respondent to file an answer on or before 6/10/77 and that the petition and related documents be filed by the Clerk without payment of the statutory filing fee. Newman, J. M-5/26/77.

Five true attest copies of petition and Order together with U. S. Marshal Form 285 handed to the U.S. Marshal for service upon the United States Attorney.

6/1

Marshals return of service filed.

6/10

4

Government's Response to Order to Show Cause, filed.

6/24

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Reply to Government's Show Cause filed.

8/3

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Order entered. ". . . it seems appropriate to grant petitioners the additional thirty days to file a notice of appeal, permitted by Rule 4(a). Accordingly, the Clerk is directed to file petitioner's notice of appeal, and leave is granted the petitioner to appeal in forma pauperis." SO ORDERED. Newman, J. M-8/3/77.

Copies Mailed.

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Notice of Appeal filed by Petitioner. . Copies of Notice sent to counsel of record and copies of docket entries together with a copy of notice sent to U.S.C.A.

B

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MAY 23 3 37 PM '77

U.S. DISTRICT COURT  
NEW HAVEN, CONNECTICUT

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

NORMAN WILCOX

:

N 77-227

v.

:

CIVIL NO. \_\_\_\_\_

UNITED STATES OF AMERICA

:

RULING AND ORDER TO FILE ANSWER

In this motion made under 28 U.S.C. § 2255 petitioner attacks the validity of his conviction by this Court on four grounds. Two of these have been dealt with in prior rulings and thus require no discussion here. The third relates to an alleged irregularity in this Court's treatment of a previous § 2255 motion, which according to petitioner had the effect of impairing his opportunity to take a timely appeal from the denial of that motion. The fourth raises a new issue that requires a response from the Government.



The two issues that have already been disposed of involve the denial of petitioner's motion to suppress and his sentencing. This Court's decision on petitioner's motion to suppress eleven five-dollar bills taken from petitioner's personal effects while he was in jail was specifically affirmed by the Court of Appeals on direct appeal from petitioner's conviction. United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974). The second issue petitioner raises concerning the Court's awareness at the time of sentencing of Parole Board procedures was dealt with in this Court's

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decision on motion to reduce sentence made by petitioner's co-defendant. United States v. Jenkins, 403 F. Supp. 407 (D. Conn. 1975). Petitioner's present motion raising the same issue is denied for the reasons stated therein.

The third issue raises the question of whether this Court should have exercised its authority pursuant to Fed. R. App. P. 4 to extend the time for petitioner to appeal the adverse decision on his previous § 2255 motion. In that case, Civil No. N-75-112, judgment was entered August 5, 1975. Petitioner's time for filing a notice of appeal expired on October 4, 1975. The Court denied petitioner's request for a further extension of time to file a notice of appeal, and the Court of Appeals dismissed the appeal as untimely. It appears that under Rule 4, an additional thirty-day extension would have been available, since the original filing period was sixty days because the United States was a party. Under the circumstances, the request for an extension should have been granted, particularly since petitioner was in the process of being transferred from one institution to another and thus apparently experienced difficulty perfecting his appeal once he was transferred away from the location of his legal papers. Accordingly, the aspect of the present motion that seeks to raise the issues adjudicated in Civil No. N-75-112, concerning waiver of presence at pre-trial hearings, is hereby denied on the merits, so that, upon a timely appeal from judgment on this claim, which must be initiated within sixty days of entry of



judgment, the Court of Appeals may have an opportunity to deal with the merits of those issues if it deems such action appropriate.

Finally, petitioner claims that the proceedings leading to his conviction violated the Interstate Agreement on Detainers, 18 U.S.C. App., in two respects. He claims that Article IV(c) of the Agreement was violated by the Government's failure to try him within 120 days of his arrival in federal custody, and that Article IV(e) was violated when he was returned to Pennsylvania to answer state charges before trial on the federal indictment. Our Circuit has adopted the rule that at least some violations of the Agreement are grounds for dismissal of an indictment. United States v. Mauro, 544 F.2d 588 (2d Cir. 1976); see also Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975); but see United States v. Scallion, \_\_\_ F.2d \_\_\_, 45 U.S.L.W. 2480 (5th Cir. Mar. 18, 1977). It is not necessarily clear that this issue may be raised by collateral attack, nor is it clear that the Agreement was violated in this case. A preliminary check of the records of the United States Marshal in this courthouse indicates that petitioner may have arrived from and been returned to federal rather than state custody, in which case the Agreement would not apply. In view of petitioner's assertion that he was being tried on a state charge, this factual issue requires exploration. Accordingly, there being no just reason for delay, Fed. R. Civ. P. 54(b), judgment shall enter dismissing petitioner's claims concerning



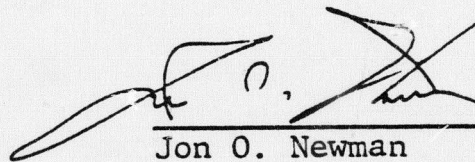
(a) denial of a motion to suppress, (b) validity of his sentence, and (c) waiver of his right to be present at pre-trial hearings, and

IT IS HEREBY ORDERED that the respondent herein file an answer on or before June 10, 1977, as to why the relief prayed for in the petition regarding petitioner's claim concerning Interstate Agreement on Detainers should not be granted, and it is further

ORDERED that service by the United States Marshal of this Ruling and Order, together with a copy of the verified petition, on the United States Attorney for the District of Connecticut on or about May 31, 1977, be deemed sufficient service, and it is further

ORDERED that petitioner's petition and related documents be filed by the Clerk without payment of the statutory filing fee pursuant to the provisions of 28 U.S.C. § 1915(a).

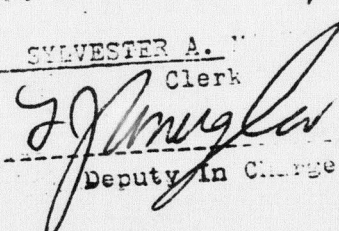
Dated at New Haven, Connecticut, this 26 day of May, 1977.



Jon O. Newman  
United States District Judge

I hereby certify that a copy of the foregoing document is on file. Dated 8/26/77

SYLVESTER A. [unclear]  
Clerk

By   
Deputy in Charge



FILED  
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U.S. DISTRICT COURT  
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

NORMAN WILCOX

V.

UNITED STATES OF AMERICA

CIVIL NO. N-77-227

O R D E R

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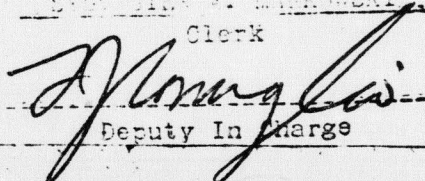
On May 26, 1977, this Court entered an order denying on the merits petitioner's motion to vacate sentence under 28 U.S.C. § 2255. Since the United States is a party to this action, the petitioner had sixty days to file a notice of appeal. Fed. R. App. P. 4(a). Petitioner has written this Court to advise that the United States Attorney's office wrote him that a copy of his notice of appeal had been

received on June 24, but that inquiry at the Clerk's office disclosed that the original had never been received there for filing. Under the circumstances, it seems appropriate to grant petitioner the additional thirty days to file a notice of appeal, permitted by Rule 4(a). Accordingly, the Clerk is directed to file petitioner's notice of appeal, and leave is granted the petitioner to appeal in forma pauperis. SO ORDERED.

Dated at Hartford, Connecticut, this 2nd day of August, 1977.

  
Jon O. Newman

I hereby certify that the foregoing United States District Judge  
is a true copy of the original document on file. Date: 8/24/77

  
Stanislaw A. Markowski  
Clerk

Deputy In Charge

DOCUMENT NO. 6



